No. 7766

United States
Circuit Court of Appeals
For the Ninth Circuit

THE COUNTY OF MARICOPA,
STATE OF ARIZONA,

Appellant,

vs.

OLIVIA ROSEVEARE,

Appellee.

APPELLEE'S BRIEF

Upon Appeal from the United States District Court for the District of Arizona

J. EDWARD JOHNSON,
D. P. SKOUSEN,
Attorneys for Appellee,
Olivia Roseveare.

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APPELLEE'S STATEMENT OF THE CASE

This is an action at law to recover taxes illegally exacted from appellee and her assignors by appellant. The illegality of collection of such taxes was judicially determined by the Supreme Court of the United States. Irvin vs. Wright, 258 U. S. 219. Appellant admits it had no right to collect the taxes involved, and that their collection was illegal (P 3 Appellant's Brief), and that unless the "statutes of limitation are available as a defense to this action, appellee is entitled to recover the amounts sued for." (P 4 Appellant's Brief).

Appellee filed an original complaint. Appellant states it was filed in 1931 (P 1 Appellant's Brief), but the original complaint is not in the transcript of Record, nor does the date of its filing appear, hence when same was filed cannot be determined from the record.

Appellant's statement that "the complaint alleged that all the money for which a recovery was sought was paid to and received by the appellant more than six years prior to the filing of the action" (P 1 Appellant's Brief), is not borne out by the record. See appellee's second amended complaint (Tr 74).

November 19, 1931, appellee filed an Amended Complaint setting forth 21 causes of action (Tr 4-52).

November 27, 1931, appellant filed a Special Demurrer to Amended Complaint on the ground that limitations had run (Tr 53-4).

December 14, 1931, court ordered special demurrer to original complaint stricken because superseded by special demurrer to Amended Complaint, and took special demurrer to Amended Complaint under advisement (Tr 56-7).

January 28, 1932, court overruled special demurrer to Amended Complaint (Tr 57).

February 4, 1932, appellant filed answer to Amended Complaint pleading the two, three and

four year statutes of limitation, and by way of a separate defense, a general denial (Tr 58-60).

February 16, 1933, written waiver of trial by jury and consent to trial before Court, was filed (Tr 62).

February 20, 1933, an "Amended Agreed Statement of Facts" covering 21 claims for tax refunds was filed (Tr 63). There were numerous variances in the agreed facts and the causes of action set forth in the Amended Complaint, names of parties assigning claims in some instances being different; property upon which taxes were assessed, years of assessment, and dates of payment of taxes differed in many instances, as well as amounts paid. Compare Amended Agreed Statement of Facts (Tr 63) and Amended Complaint (Tr 4). These variances necessitated the filing of a Second Amended Complaint in order that the pleadings might conform to the proof.

September 17, 1934, stipulation was filed as follows:

> "That the Second Amended Complaint and the Agreed Statement of Facts, setting forth the claim of the plaintiff as the first cause of action and the assigned claims as subsequent causes of action, may be filed without a further order of the above entitled court;
>
> "That the assignments of the various assignors to Olivia Roseveare, the plaintiff, may

be filed as evidence of the transfer of the various claims;

"That upon the defendant's consent to the court's rendering judgment in favor of the plaintiff on her first cause of action and including all the other subsequent causes of action in the sum of $13,024.32, the plaintiff will waive and does waive all interest accruing on the said sum and sums of money paid by the plaintiff and her assignors as taxes back of the years 1931 or otherwise three years interest." (Tr 72-73).

September 18, 1934, pursuant to said stipulation the Court ordered that Plaintiff be permitted to file Second Amended Complaint in accordance with said stipulation. (Tr 73-74). This stipulation and order should be kept in mind in considering appellant's four assignments of error, and the statement in appellant's brief that "On September 18, 1934, appellee filed a second amended complaint upon which the case was tried" (P 3 of Appellant's Brief).

THE APPELLANT DID NOT DEMUR SPECIALLY OR AT ALL TO THE SECOND AMENDED COMPLAINT SO FILED, AND NEVER FILED AN ANSWER THERETO.

Appellant's statement that "The appellant's demurrers were urged against the second amended complaint and were overruled and an exception taken to the Court's ruling (Tr 123)", page 3 of appellant's brief, is not borne out by the record.

October 16, 1934, the cause went to trial before the Court without a jury. Appellee was sworn and examined in her own behalf, and Appellee's Exhibit Number one, 21 assignments of Tax Claims was admitted in evidence, whereupon appellee rested, and the following minute entry appears:

> "Whereupon, defendant renews Special Demurrers to Plaintiff's *Amended* Complaint, and excepts to the Order of the Court HERETOFORE entered herein, overruling said demurrers." (Tr 122-123).

Thereupon appellant rested. Appellant did not request a ruling as above indicated, and the court did not rule thereon, obviously because the amended complaint, having been superseded by the Second Amended Complaint, was *functus officio.*

The Court thereupon ordered judgment for the appellee (Tr 123-124), and judgment was entered in favor of appellee as per stipulation (Tr 72-73) for the principal sum of $13,024.32, together with the sum of $2944.38 interest, $27.30 costs, and the total sum of $15,996.00 to bear interest at the rate of 6 per cent per annum from October 16, 1934, until paid (Tr 124-5).

Appellant made no motion for judgment, nor any motion requiring the court to make a declaration of a principle of law as to the Second Amended Complaint or the Amended Agreed Statement of Facts and the evidence, and took no exception to

the judgment of the court, nor does the Transcript of Record contain a bill of exceptions.

POINT ONE

THE QUESTION OF LIMITATIONS IS NOT PRESENTED BY THE RECORD IN SUCH A MANNER THAT APPELLANT'S ASSIGNMENTS OF ERROR CAN BE CONSIDERED BY THE COURT.

ARGUMENT

(a) Upon the filing of the second amended complaint the first amended complaint became *functus officio* from the date of such filing, and neither a special demurrer nor an answer setting up the plea of limitations, was filed thereto, hence not being raised either by demurrer or plea, limitations were and are not available to appellant in this action.

> Sec. 2069 R. C. '28 of Arizona: "The laws of Limitation are not available to any person in an action unless specially set forth as a defense."

That the cause of action is barred by limitations is a ground of demurrer. Sec. 3776 R. C. '28.

If such objection is not taken either by demurrer or answer the defendant waives same. Sec. 3777 R. C. '28.

This waiver has been applied in action where County was defendant:

> Santa Cruz County, State of Arizona, v. Earhart, 20 Ariz. 141, 177 Pac. 270.

The Supreme Court of Arizona has been quick to enforce a waiver, even where limitations were properly pleaded:

> Ainsworth v. Lipsohn, 22 Ariz. 291-7, 196 Pac. 1028-30 Connor Livestock Co. v. Fisher, 32 Ariz. 80-6, 255 Pac. 996-8.

> "Among other contentions made is that the *statute of limitations is a bar to the action. It is perhaps a sufficient answer to this to say that the statute was not pleaded as a defense to the cause of action set forth in the amended petition.* The original petition was filed December 19, 1922. This was general in terms and made no reference to any written contracts. January 16, 1923, a demurrer to the petition was interposed on the ground that the action was not commenced within the time required by regulation 83 for the United States Consular Courts in China. April 10, 1923, an amended petition was filed, based on the written contracts, and copies of those contracts were attached as exhibits. April 21, 1923, the court filed an opinion overruling the demurrer to the petition. It would appear that the record is somewhat inconsistent on its face.
>
> "*The amended petition*, complete in itself,

superseded the original petition for all purposes, and no ruling of the court on the original petition, whether made before or after the amendment can be assigned as error. 'An amended complaint, which is complete in itself, and which does not refer to or adopt the original complaint as a part of it, entirely supersedes its predecessor, and becomes the sole statement of the cause of action. *The original complaint becomes functus officio from the date of the filing of its successors.*' United States v. Gentry, 119 F. 70, 75, 55 C. C. A. 658, 663."

Wulfsohn v. Russo-Asiatic Bank, 11 F. (2d) 715 (9th C. C. A.).

See also Eisenbeiss v. Payne. 25 P. (2d) 162-4). (Ariz.).

Appellant's first three assignments of error are that the Court erred in overruling the special demurrer to the Complaint and Amended Complaint (P. 4, 5, 6, Appellant's brief). The original complaint is not contained in the Transcript of Record, nor is the original demurrer. The amended complaint and the original complaint became *functus officio* upon the filing of the second amended complaint, to which no demurrer or answer was ever filed. Furthermore, the demurrer and answer filed as against the amended complaint were not urged as against the second amended complaint, and no ruling insofar as the second amended complaint was concerned was ever obtained relative to same being barred by limitations, appellant, at the close

of appellee's case, contenting itself with the following statement: "Whereupon, defendant renews Special Demurrers to Plaintiff's Amended Complaint, and excepts to the Order of the Court HERETOFORE entered herein, overruling said demurrers." (Tr 122-123). Even this statement was not made until after trial. By proceeding to trial without obtaining a ruling, the demurrer was in any event waived. Dessart v. Bonynge, 10 Ariz. 37, 85 Pac. 723; Reid v. Van Winkle, 31 Ariz. 267-9, 252 Pac. 189-90.

This leaves for consideration, only the fourth assignment of error, page 6 appellant's brief, as follows:

> "The Court erred in rendering the judgment herein for the reason that the same appears to have been based upon an agreed statement of facts, and it appears in said agreed statement of facts that each of the causes of action set forth in the COMPLAINT AND AMENDED COMPLAINT is barred by the Statute of limitations, and particularly by the provisions of said Sections 2059, 2060 and 2063, Revised Code of Arizona, 1928; in that it appears in said agreed statement of facts that each of said causes of action sued on herein accrued more than four years prior to commencement of this action."

(b) Appellant failed to move for judgment in its favor when appellee rested; failed to ask for a declaration of law that it was entitled to

judgment upon the evidence, including the Amended Agreed Statements of Facts, stipulation of counsel, and the other evidence introduced in the trial court and failed to invoke the Court's ruling thereon; failed to except to the judgment as rendered in favor of appellee; failed to present a bill of exceptions to this Court.

The Court will again note the statement on page 3 of Appellant's brief that "On September 18, 1934, appellee filed a second amended complaint upon which complaint the case was tried." The Court will also observe the further statement in the same paragraph that "The appellant's demurrers were urged against the second amended complaint and were overruled and an exception taken to the Court's ruling (Tr 123)." This latter statement is not borne out by the record (Tr 123), and is incorrect, and the Court will observe that each assignment of error is based not in any respect on the Second Amended Complaint, but solely upon the original complaint and first amended complaint. The second amended complaint was filed pursuant to stipulation (Tr 72-73), and permitted and ordered to be filed by the Court (Tr 73-74), and was never withdrawn. Counsel, in their brief, would like to circumvent the fact that no demurrer or answer was filed or urged as against the second amended complaint, and no ruling by the Court obtained thereon, but we do not think that is possible. The defense of limitations may be, and we believe has been, waived, as shown by the record.

It is the rule no doubt, that errors apparent upon the face of the record may be reviewed in the absence of a formal bill of exceptions, and where there is an agreed statement of facts the power of review in a law case tried before the court without a jury, is somewhat more ample than in the absence of an agreed statement of facts. Nevertheless, where there is an indication in the record that the appellant waived its right to assign error on a particular matter, a bill of exceptions is necessary; and where it appears that there was evidence introduced in addition to the agreed statement of facts, a bill of exceptions is also necessary to entitle appellant to review of the alleged error.

> "But no exception or bill of exceptions is necessary to open a question of law already apparent on the record and there is nothing in the record that INDICATES A WAIVER OF THE DEFENDANT'S RIGHTS."

Denver v. Home Savings Bank, 236 U. S. 101-104.

Wulfsohn v. Russo-Asiatic Bank, 11 F. (2d) 715-16 (9th C. C. A.).

Lumbermen's Trust Co. v. Town of Ryegate, 61 F. (2d) 14-17.

Kansas City Life Ins. Co. v. Shirk, 50 F. (2d) 1046 (10th C. C. A.).

"If plaintiff desired to preserve his right to review, in the event of an adverse ruling in such final disposition, he should have moved for judgment in his favor or asked for a decla-

ration of law that he was entitled to judgment upon the evidence as a matter of law, and invoked the court's ruling thereon and brought such rulings here for review upon a proper bill of exceptions.

"The assignments of error . . . . . are leveled at the general finding of the court and for the reasons above stated present questions not open to review here."

McPherson v. Cement Gun Co., Inc., 59 F (2d) 889-890 (10th C. C. A.).

THERE IS AN INDICATION IN THE RECORD THAT APPELLANT WAIVED ITS RIGHTS, AND THE APPELLANT DID WAIVE ITS RIGHTS. It failed to demur or answer to the Second Amended Complaint. Also, the stipulation providing for waiver of three year's interest upon defendant's consent to the court's rendering judgment in favor of the plaintiff on her first cause of action and including all the other subsequent causes of action in the sum of $13,024.32 (Tr 72-73), and the fact that the judgment (Tr 124), approved as to form by counsel for appellant, and never excepted to, followed the provisions of said stipulation, indicate a waiver, and that the court took said stipulation into consideration in rendering its judgment.

For these reasons, notwithstanding the Amended Agreed Statement of Facts, a bill of exceptions was necessary to entitle appellant to a review of any one or all of its four assignments of error, as

otherwise the exact basis for the court's ruling and judgment is not presented to this Court fairly.

The record further fails to show that appellant requested a declaration of law in its favor on the Amended Agreed Statement of Facts and/or the other evidence introduced (Tr 123) and said stipulation and the Second Amended Complaint. No motion for judgment on behalf of appellant was made, and no exception to an adverse ruling thereon taken. A bill of exceptions was necessary, under the record here presented.

> Lumbermen's Trust Co. v. Town of Ryegate, 61 F. (2d) 715-16 (9th C. C. A.).

While the modern trend of authority is that the defense of limitations is no longer considered an unconscionable defense, it being a statute of repose, and to prevent fraud, yet the instant case does not fall within the logic of such reasoning, as it is conceded in Appellant's brief to be the fact that the taxes sought to be recovered were illegally collected, and the policy of the County of Maricopa heretofore has been with the exception of this present appeal, that upon a judicial determination that the land involved was tax exempt under the Irvin v. Wright case supra, the refund would be made, and no appeals from such cases were taken. The County is morally and legally obligated to refund these taxes, judicially determined by the Supreme Court of the United States to have been illegally exacted in violation of federal law.

POINT TWO

IN ANY EVENT THE TWENTY-FIRST CAUSE OF ACTION WAS NOT VULNERABLE TO DEMURRER IN THE FORM PLEAD ON THE GROUND OF LIMITATIONS AND APPELLEE WAS ENTITLED TO JUDGMENT ON HER SECOND AMENDED COMPLAINT AND THE AMENDED AGREED STATEMENT OF FACTS THEREON, AND NO REQUEST HAVING BEEN MADE BY APPELLANT FOR A SEPARATE RULING AS TO EACH CAUSE OF ACTION, AND NO EXCEPTION HAVING BEEN TAKEN TO THE GENERAL FORM OF THE COURT'S ORDER OVERRULING DEMURRER, NOR TO THE FORM OF JUDGMENT, AND COUNSEL FOR APPELLANT HAVING APPROVED THE FORM OF JUDGMENT, APPELLANT IS NOT NOW ENTITLED TO REVERSAL NOR TO COMPLAIN THEREOF.

ARGUMENT

> "We think the plaintiff's contention must prevail. It is elementary that, if any count in a declaration is good, a general demurrer to the whole declaration must be overruled, unless the court shall make the ruling speak the whole truth by sustaining in part and overruling in part."
>
> Burgess v. Mazetta Mfg. Co. 198 Fed. 855 (7th C. C. A.).

> "The rule is well settled that where a complaint contains several counts a general

demurrer thereto upon the ground that it fails to state facts sufficient to constitute a cause of action will be overruled if either one of the counts be sufficient. Maxwell on Code Pleading, 375. The proper procedure, where there are several counts is to demur to each one separately."

Palmer v. Breed, 5 Ariz. 18, 43 Pac. 219.

"The rule that a demurrer to a declaration, complaint or petition will be overruled where the pleading states facts sufficient to entitle plaintiff to any relief either legal or equitable, applies whether the matter alleged is sufficient to entitle plaintiff to a part only of the relief prayed for."

49 C. J. 429, Sec. 541.

It appears in the Amended Agreed Statement of Facts that taxes were assessed and collected for years 1916 to 1933 inclusive in the lump sum of $2833.63 and were paid under protest during the year for which they were assessed. (Tr 71 and 119). No attempt was made by appellant to have the specific amounts paid during each year, segregated, and hence it is impossible to determine what part, if any thereof, is barred, if appellant is entitled to assign error in this case thereon at all. Such segregation not having been made nor requested, the Second Amended Complaint was to that extent at least good as against demurrer, and the judgment rendered was good at least to that extent.

If the special demurrer filed against the first amended complaint may be considered as a separate demurrer to each cause of action (note its form, Tr 53-54, and its prayer, viz: "Wherefore, defendant prays that plaintiff's amended complaint be dismissed"), nevertheless the order of the court overruling same was general in form (Tr 57), and the judgment entered (Tr 124-5), was general in form with no attempt at segregation as to the specific causes of action. No request was made to the Court for a separate ruling as to each separate cause of action, and no objection was made to the general form of the order overruling the demurrer, nor to the general form of the judgment, nor was any exception taken as to the forms thereof. The order overruling the special demurrer was responsive to the prayer of the demurrer being the converse of the relief prayed for. In the absence of such a request, and exception to an adverse ruling thereon, the order overruling the demurrer to appellee's first Amended Complaint was proper, and the judgment, its form not having been objected to, and exceptions reserved to an adverse ruling thereon, and no request having been made for judgment segregating the specific causes of action, but, on the contrary, counsel for appellant having approved the judgment as to form (Tr 125), neither the order overruling the special demurrer to appellee's amended complaint, nor the judgment itself, are subject to reversal.

POINT THREE

LIMITATIONS HAVE NOT RUN AGAINST THE CAUSES OF ACTION ALLEGED IN THE SECOND AMENDED COMPLAINT.

ARGUMENT

(a) The transcript of record does not disclose when the action was commenced. The original complaint is not included in the transcript, nor its date of filing. It cannot be determined that limitations had run at the time the action was commenced. The presumption is in favor of the judgment of the lower court. The burden was upon appellant to present a record clearly showing error.

(b) By section 20 (second) of the Enabling Act, xl Revised Code of 1928, pursuant to which act Arizona was admitted to the Union, lands against which the taxes in question were assessed were forever exempted from taxation by the State of Arizona while same remained the property of the United States. A vested right to such exemption was created:

> Irvin v. Wright, 258, U. S. 219, 66 L. Ed. 573, 42 S. C. 293.
>
> United States v. Board of Com'rs of Comanche County, Okl. (DC) 6 F. Supp. 401.

and was recognized by Section 2, Article IX, of the Constitution of Arizona, providing that there shall be exempt from taxation all Federal . . . . property.

This right to exemption is absolute and self executing. The Supreme Court of Arizona, construing the same section and article of the State Constitution, held that a statute providing that unless a Soldier claimed his exemption between January and July of each year, he waived his rights thereto, was invalid in-so-far as it provided for a waiver.

> "The right of exemption is absolute, and no act of the legislature can take it from him. The provision for the exemption, under the conditions and circumstances prescribed, is mandatory in character and self-executing. His failure to make the proof before the assessor was not a waiver of the exemption, AND LEGISLATION ATTEMPTING TO MAKE IT A WAIVER IS INEFFECTIVE."
>
> Calhoun v. Flynn, 37 Ariz. 62-68, 289 Pac. 157-9.

The case supra, of course, involved a purely state right as distinguished from a Federal right. The Enabling Act is a contract between the Federal government and the State, and appellee's rights are preserved by that act, the United States Constitution and the State Constitution. To hold, where a political subdivision of the State has collected an illegal tax under such circumstances, that appellee's right to exemption from such tax may be limited by a general statute of limitations merely because she has paid the tax, the right being primarily Federal, is to permit to be done indirectly what cannot be done directly.

(c) In any event, the County having collected such tax, illegal by virtue of such Federal exemption, and the right to exemption being absolute and one that could not be taken away by any limiting legislation of the State requiring payment of tax under protest and suit to recover, it should be held that appellee's cause of action did not accrue until a judicial determination had been obtained that the specific land upon which the tax was paid, was tax exempt land. With the exception of this particular case, that procedure has heretofore been followed, by the county.

(d) The statute of limitations does not apply where the United States is a party:

United States v. Rickert, 188 U. S. 436, 23 S. Ct. 478, 47 L. Ed. 532.

United States v. Kagman, 118 U. S. 375, 6 S. Ct. 1109, 30 L. Ed. 228.

United States v. Nice, 241 U. S. 597, 36 S. Ct. 696, 60 L. Ed. 1192.

United States v. Board of Com'rs of Comanche County, Okl. (DC) 6 F. Supp. 401.

United States v. Minnesota, 270 U. S. 181, 46 S. Ct. 298, 70 L. Ed. 539.

The homesteaders became third party beneficiaries under the compact between the Federal and State Government (Enabling Act). The rights of the homesteader are measured by the rights of the Federal Government. The homsteaders are entitled to the immunities and privileges of the Government. The matter is one of public interest.

The Federal Government reserved to itself a dominating sovereignty in the affairs of the homesteader under its laws, rules, and regulations, including the right to administer its laws exclusively in matters pertaining thereto, precluding the States from interfering therewith or infringing thereupon. The homsteaders being the beneficiaries of the contract, the State may not, by a general statute of limitations which cannot be read into the contract, impair their rights. The appellant having violated a purely Federal right of appellee should not be permitted to avoid its illegal act by plea of limitations.

(e) Upon collection of the instant taxes, the County became a trustee for the benefit of the taxpayers. A trustee cannot invoke the statute of limitations until he renounces the trust and thereafter claims possession independent of the trust relationship, and communicates such repudiation to the beneficiary.

In the case of Ward v. Love County, 253 U. S. 17, 64 L. Ed. 751-9, the Supreme Court of the United States discussing the right of Indian allottees to recover taxes paid the county on exempt lands, said:

> "In legal contemplation it (the county) received the money for the use and benefit of the claimants, and should respond to them accordingly."

In the case of United States v. Board of Cm'rs of Comanche County, Okl. (D. C.) 6 F. Supp. 401, the court stated:

> "Where taxes are paid under protest the collecting authority can only hold them in trust."

If an illegal tax is collected and paid into a municipal treasury, it is held in trust for the persons paying same.

Shoemaker v. Bd. Com. Grant Co. 36 Ind. 175,

> "As between the city and the school board, the city did not hold these collections in her own right. The possession of the one was the possession of the other; the possession of the city was precarious, and not *animo domini;* and being trustee she could not acquire the trust fund by lapse of time. There was no adverse possession in repudiation of the fiduciary relation."

New Orleans v. Fisher, 180 U. S. 185, 45 L. Ed. 485.

> "Mere lapse of time constitutes of itself no bar to the enforcement of a subsisting trust; and time begins to run against a trust only from the time when it is openly disavowed by the trustee."

Oliver v. Piatt, 3 How. 411, 11 L. Ed. 622.

"Claim of owner of land to recover money which the United States held for him as trustee did not accrue until demand was made therefor."

United States v. Cooper, 120 U. S. 126, 30L. Ed. 606.

The taxing authorities of the County honestly believing that they had a right to do so, and that they were legally bound to do so, collected the taxes. There was no fraud, misrepresentation, concealment or use of influential or confidential relations involved, hence the trust is not a constructive trust, but a resulting trust. In Perry on Trusts, 7th Ed., section 166, it is said:

"If a person obtains legal title to property by such arts or acts or circumstances of circumvention, imposition or fraud, or if he obtains it by virtue of confidential relation and influence under such circumstances that he ought not, according to the rules of equity and good conscience, as administered in chancery, to hold and enjoy the beneficial interest of the property, courts of equity, in order to administer complete justice between the parties, will raise a trust by a construction out of such circumstances and relation;"

"Generally speaking, the constructive trusts described in this chapter are not trust at all in the strict and proper signification of the word 'trustee'; but as courts are agreed

in administering the same remedy in a certain class of frauds as are administered in fraudulent breaches of trusts, and as courts and the profession have concurred in calling such frauds constructive trusts, there can be no misapprehension in continuing the same phraseology while a change might lead to confusion and misunderstanding."

Nevertheless, there was some question to the matter, and the taxing officials knew that in the event the taxes were declared illegal, as was done in the case of Irvin v. Wright, supra, it was their duty to refund such taxes. This duty is expressly recognized by Section 3136 R. C. 1928. The presumption is that the County did intend to refund the taxes and to perform its duty in the event the taxes were determined to be illegally collected. Under these circumstances, the trust is in the nature of a resulting trust rather than a constructive trust. The rule is stated in Vol. 65 Corpus Juris, page 223-5, as follows:

"Resulting Trust distinguished. Resulting and constructive trusts, while frequently confused, are clearly distinguishable. In the case of a resulting trust there is always the element, although it is an implied one, of an intention to create a trust, by reason of which, although it is by no means an express trust, it approaches more nearly thereto. Constructive trusts on the other hand have none of the elements of an express trust, but arise entirely by operation of law without reference to any

actual or supposed intention of creating a trust, and often directly contrary to such intention, for the purpose of working out right and justice or frustrating fraud. Constructive trusts embrace a much larger class of cases than resulting trusts, their forms and varieties being said to be practically without limit."

At page 366 of 65 C. J., appears the following:

"The doctrine of resulting trusts is founded upon the presumed intention of the parties; and, as a general rule, it arises where, and only where, such may be reasonably presumed to be the intention of the parties, as determined from the facts and circumstances existing at the time of the transaction out of which it is sought to be established. In a resulting trust there is always the element of an intention to create a trust, which is not expressed, but is implied, or presumed by law from the attendant circumstances and without regard to the particular intentions of the parties, so, in a proper case, the trust may exist notwithstanding the party, to be charged as trustee may never have agreed to the trust and may have really intended to resist it."

Resulting trusts are in the same class as express trusts insofar as limitations are concerned, and the statute does not begin to run until there is some repudiation thereof brought to the knowledge of the beneficiary.

"Resulting Trusts. So far as concerns the statute of limitations it is not material whether a suit is brought to enforce an express or a resulting trust, if it is a trust not cognizable by the courts of common law; and the statute of limitations does not run in favor of the trustee of a resulting trust, which most frequently arises where one person pays the consideration for a purchase and title is taken in the name of another, until the trustee disavows the trusts or asserts some right to the property inconsistent with, it and the *cestui que* trust has knowledge of such disavowal or assertion, or, from the circumstances, ought to have learned of it." 37 C. J. 908.

This rule has been followed by the Supreme Court of Arizona in the case of Navajo-Apache Bank etc. Co. v. Deamont, 19 Ariz. 335, 170 Pac. 798, where the court said:

"The mortgagee, after paying the mortgage debt and the reasonable charges and expenses contemplated by the mortgage, held the overplus as the trustee for the appellant. This possession of such overplus was the possession of the beneficiaries thereof; hence the appeal of the statute of limitations under the facts and circumstances of this case, was of no avail."

A case that appears to be directly in point and supporting appellee's theory, decided by the Supreme Court of Arizona, is: Hammons v.

National Surety Co., 36 Ariz. 459-69, 287 P. 292-5.

See also Walrath v. Roberts, 12 F. (2d) 443.

(f) Section 3136 R. C. of 1928, gives the State's consent that the County be sued:

> " . . . . . After payment an action may be maintained to recover any tax illegally collected . . . . "

The statute contains no limitation as to time.

No limitation being prescribed therein, the general statutes of limitation are not applicable. The consent is granted in unlimited terms.

> Louisville Male High School v. Auditor, 80 Ky. 336, 342.

In other instances where suit against counties is authorized, limitations are specifically stated See Sec. 786 R. C. 1928. The same is true in statute authorizing suit direct against the State. See Sec. 30 R. C. 1928.

The legislature has modified the common law rule of limitations (See 1928 Revised Code of Arizona, Sections 786, 1566 and 1572), and if no limitation is set out by the Code, none is intended.

In conclusion, no attempt has been made to discuss the question whether the two, three or four year statutes of limitation (Sections 2059, 2060, 2063 supra), would be the applicable statute in the event any of such statutes were held to apply, as in Appellant's brief, page 4, it is con-

ceded that if any applies, it is the four year statute.

Neither have we attempted to distinguish the authorities cited in Appellant's brief, as to do so would unduly prolong this brief. Suffice to say, that none of the cases cited were based upon the points raised in this brief.

We respectfully submit that the judgment of the lower Court should be affirmed.

D. P. SKOUSEN,
J. EDWARD JOHNSON,
Attorneys for Appellee.